

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MUBENDE**  
**CIVIL APPEAL NO. 49 OF 2018**  
**(ARISING FROM CIVIL SUIT NO. 040 OF 2013)**  
**BALAMAGA JOSEPH=====APPELLANT**

**VERSUS**

|  |   |                         |
|--|---|-------------------------|
| <b>1. MATAYO SEWANKAMBO</b><br><b>2. MONICA KAMOGA</b><br><b>3. ALEX NALUKWAGO</b> | } | <b>=====RESPONDENTS</b> |
|--|---|-------------------------|

**JUDGMENT:**

**BY HON JUSTICE ISAAC MUWATA - JUDGE**

This is an Appeal against the decisions of the Magistrate Grade 1 court dated 12<sup>th</sup> July 2018 in Civil Suit No. 040 of 2013 whereby court declared the appellant/defendant a trespasser and gave Judgment for the Respondents.

The brief facts were as follows:

The Respondents/Plaintiffs who are the Administrators of the estate of the Late Leo Kafeero instituted a Civil Suit No. 040 of 2013 against the Appellant/defendant for trespass, breach of agreement, a declaration that the defendant is a trespasser on the suit land, general damages and costs of the suit.

The Respondents also sought orders of eviction against the appellant.

They contended that the appellant illegally occupied 17 ½ acres of the land belonging to the late Leo Kafeero. The Respondents are also the Joint Registered Proprietors of the land comprised in Singo Block 211 Plot 1, Kibalinga- Bukonyogo.

The appellant filed a written statement of defence where he contended that he is not a trespasser, that he is a Kibanja holder and bonafide occupant on the suit land having acquired the same by way of inheritance from his late father one Tofili Mukasa who also inherited the same from his late father Balamaga Salongo Mbikiti Yowana. He prayed that the suit be dismissed with costs.

At the trial court, three issues were raised for resolution as here below: -

- 1) Whether or not the defendant is a trespasser on the suit land.
- 2) If so, whether an order for eviction is the remedy.
- 3) Whether the plaintiffs were entitled to any of the remedies.

The trial Magistrate found that the defendant was a trespasser because he had refused to pay ground rent for 8 years, yet he had not bought himself out. She gave judgment for the plaintiffs with orders as sought for in the plaint.

The appellant being dissatisfied with the Judgment and orders of H/W Namae Irene Magistrate Grade One at the Chief Magistrate's Court at Mubende delivered on 12/7/2018 lodged his appeal on the following grounds:-

- 1) That the learned trial Magistrate erred in law and fact when she held that the appellant was not a bonafide occupant of the suit land.
- 2) That the learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and thus came to a wrong conclusion that the appellant had no Kibanja on the suit land.
- 3) That the trial Magistrate erred in law and fact when she ordered the appellant to pay the costs of the suit.

Counsel for the appellant submitted that the appellant is a bonafide occupant of the suit land on the said registered land of the Respondents/Plaintiffs. That he was a bonafide occupant of the suit

land having acquired the same by way of inheritance from his late father the late Tofili Mukasa who also inherited the same from his late father Balamaga Salongo Mbikiti Yowana.

That they had lived on the said Kibanja since 1928 and had burial grounds on it that PW2 and PW3 had confirmed the long usage of the land by the appellant.

Counsel for the appellant argued that the trial Magistrate erroneously relied upon section 33 of the Land Act misdirecting herself on the law and fact with regard to lawful and bonafide occupancy.

I have carefully studied the submissions on both sides and the Judgment of the trial court. I am also aware of the duty of this court as a first appellate court to re-appraise all the evidence on record and reach its own decision bearing in mind that it neither heard nor saw witnesses during the hearing to assess their demeanor. See the case of **Celle V Associated Motor Boat Ltd [1968] EA: 23, Lwanga Musoke V Sam Galiwango SCCA No. 048 of 1995.**

The appellate court may interfere with a finding of fact if the trial court is shown to have over looked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court.

In particular, this court is not bound necessarily to follow the trial Magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of the particular circumstances or probabilities materially to estimate the evidence on the demeanor of a witness inconsistent with the evidence in the case generally. I shall now proceed to consider the appeal before this court.

Ground 1 of the appellant faults the learned trial Magistrate for having held that the appellant was not a bonafide occupant on the suit land.

A bonafide occupant is defined by section 29 (2) of the Land Act Cap 227 as follows:-

“ Bonafide occupant means a person who before the coming force of the constitution:-

- a) Had occupied and utilized or developed any land unchallenged by the registered owner for twelve years or more; or
- b) Had been settled on land by Government or an agent of the Government which may include a local authority.

It appears to me clearly that the above definition refers to only registered land which in my view is land registered under the Registration of Titles Act [RTA] indeed S.1 (2) of the Land Act defines “Registered owner” as follows:

“Registered owner” “means the owner of registered land registered in accordance with the registration of Titles Act.”

It therefore follows that for one to qualify as a bonafide occupant, he or she must have been in occupation of the land registered under the RTA.

In this case, there is no dispute that the respondents are the registered proprietors of the land comprised in Singo BLOCK 211 Plot 1 at Kibalinga- Bukonyogo.

What is in contention however is whether the appellant is a bonafide occupant on the said registered land of the Respondents.

In the case of **Kampala District Land Board and Chemical Distributors V National Housing Construction Corporation, Civil Appeal No. 2 of 2004**, it was held that “ a person who has

been in occupation or possession of the suit land for more than 12 years at the time of coming in force of the 1995 Constitution and utilized the land without any challenge from the registered proprietor can claim bonafide occupancy. The right to bonafide occupancy must be actual or real. It must be based on unchallenged right. The right which is not capable of being challenged does not bellow bonafide occupancy.”

In the instant case there was proof of occupation and utilization by the predecessors to the defendant/appellant. This was confirmed by PWW2, PW3, DW1 and DW2 in their testimony. Occupation and utilization of the land by a person for more than 12 years unchallenged by a registered proprietor are the key and essential ingredients in determining bonafide occupancy and not the landlord tenant relationship as held by the learned trial Magistrate in her Judgment on page 12.

Accordingly, I find that the appellant was a bonafide occupant. This ground of appeal succeeds.

On ground 1, it is contented that the learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and turns court to a wrong conclusion that the appellant had no Kibanja on the suit land.

In her judgment the trial Magistrate considered the evidence of PW1, PW2 and PW3. They stated that the suit land/property has more than 70 tenants and the defendant is one of them. However, that the defendant left his family Kibanja measuring 8 acres and trespassed on 2 other bibanja measuring 10 acres and refused to pay busuulu on the bibanja previously owned by his father. The learned trial Magistrate went on to find that the defendant attended all the meetings called by the plaintiffs and the area leaders whereby the issue of payment of busuulu or the tenants acquiring the legal interest from the plaintiffs was discussed.

The learned trial Magistrate also confirmed that the defendant is among the people who contributed shs. 20,000/= as tenants towards the search for their landlords who emerged in 2009-2010. The trial Magistrate further observed that the defendant did not dispute the fact that PW2 who is the L.C.I Chairman of Bukonyogo and also the Chairman of the Bibanja Association was always on attendance of the meetings where it was resolved that all sitting tenants pay ground rent to the plaintiffs who are the landlords or acquire the legal interest and the fact the defendant himself was in attendance.

The defendant on re-examination stated that he refused to pay busuulu because the plaintiffs are not the landlords.

I agree with the learned trial Magistrate at page 15 of her Judgment when she observed and held as follows:-

“.....under section 32 (a) of the Land Act Cap 227 as amended by Act No. 1 of 2010 (not 2016) that “ a lawful or bonafide tenant shall not be evicted from registered land except upon an order of eviction issued by a court and only for nonpayment of the annual nominal ground rent.” That is the position of this law.

I also agree with counsel for the respondents that the defendant attended the meetings but ignored, refused and neglected to abide by the recommendations and resolutions of the meetings.

The defendant/appellant only owns the Kibanja he inherited from his father of about 8 acres for which he does not pay ground rent as referred by law and he encroached on the other bibanja.

I therefore find no merit in ground two and its facts.

In ground 3 it is contended that the trial Magistrate erred in law and fact when she ordered the appellant to pay the costs of the suit.

Court has the discretions to award costs and against which parties. This court is guided by the provisions of section 27 (1) of the Civil

Procedure Act which confers upon the court the discretion and full power to determine by whom and to what extent costs incidental to all suits are to be paid and give necessary directions for that purpose. As a general rule the successful party is entitled to an award of costs and hence costs follow the event.

All in all I find no merit in the appeal save in the first ground which has been extinguished by my findings in the other grounds.

Accordingly the appeal is hereby dismissed with costs in this court and the court below.

I so order.

**JUDGE**  
**10/02/2021.**

10/02/2021

Appellant in court.

1<sup>st</sup> Respondent in court

2<sup>nd</sup> and 3<sup>rd</sup> Respondents absent.

Counsel Eddy Sekonde for the Respondents present.

Counsel Ojulong Emmanuel for the Appellant in Court.

**Court:** Judgment read in open court.

**JUDGE**  
**10/02/2021.**